No. 03-1569

Supreme Court, U.S.
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In The
Supreme Court of the United States

DONALD MARTIN, Individually,

Petitioner,

v.

DECOMA LOVE-LANE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT DECOMA LOVE-LANE

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QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Fourth Circuit properly apply prevailing standards of Rule 56 of the Federal Rules of Civil Procedure in determining that there are genuine issues of material fact regarding respondent's free speech claim against petitioner which entitle respondent to a trial by jury and in denying petitioner's qualified immunity defense?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

Background 1

Lewisville Elementary School 2

Proceedings Below 7

REASONS FOR DENYING THE WRIT 8

The Fourth Circuit Properly Applied Rule 56 Standards in Upholding Respondent's Right to a Jury Trial on the Facts Underlying her Free Speech Claim 9

1. The Fourth Circuit's application of Rule 56 standards does not raise any conflicts with this Court's decisions in *Saucier v. Katz* and *Anderson v. Creighton*. 12

2. The Fourth Circuit's decision does not conflict with the decisions of other circuits. 19

3. The Fourth Circuit's decision does not present new federal grounds which require review by this Court. 19

CONCLUSION 19

TABLE OF AUTHORITIES

Cases:

Anderson v. Creighton,
482 U.S. 635 (1987) ..... *passim*

Hope v. Pelzer,
536 U.S. 730 (2002) 18, 19

Love-Lane v. Martin, et al.,
355 F.3d 756 (4th Cir. 2004) ..... *passim*

Love-Lane v. Martin, et. al.,
201 F. Supp. 2d 66 (MDNC 2002) 7

Potter v. Columbia Broadcasting System, Inc.,
364 U.S. 464, 473(1962) 18

Saucier v. Katz,
533 U.S. 194 (2001) ..... *passim*

Settlegoode v. Portland Public Schools et al,
362 F.3d 1118 (9th Cir. 2004) 19

Constitutional Provisions:

U.S. CONST. amend. I 7, 10, 12

U.S. CONST. amend. IV 9, 14

Statute:

42 U.S.C. § 1983 9

Rules:

FED. R. CIV. P. 56 ..... *passim*

Sup. Ct. R. 10..... 8

Sup. Ct. R. 12.5..... 7

STATEMENT OF THE CASE

Background

DeComa Love-Lane is an African-American educator who has been employed with the Winston-Salem/Forsyth County Schools since 1974. Upon her employment, school system documents describe her as "one of the best black prospects . . . ever interviewed," who "is very interested in students (white and black)–it makes no difference." *JA 427.* She served as a school teacher until 1988. *JAS 1199.*[1]

In 1988, Love-Lane was promoted to the position of assistant principal. She was assigned to Atkins Middle School in Winston-Salem. There, she worked under principal Don Golding. Love-Lane excelled in her performance as an assistant principal during her first assignment at Atkins. During each of the three years of her assignment, she was evaluated as excellent or superior in almost all aspects of her performance. Starting in the second year, her principal recommended that she be promoted to principal at some school within the system. *Record, Love-Lane Dep. Exh. 41-43.*

From 1991 to 1993, Love-Lane was assigned to Moore Elementary School as assistant principal. She worked under principal Dr. Marsha Epstein. During each of the two years of her assignment, she was

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[1]Citations to the evidence of record will include references to the Joint Appendix, "JA," and to the Joint Appendix of sealed documents, "JAS" filed with the Fourth Circuit; and to other evidence, as described, in the record below.

evaluated as superior in every aspect of her performance. In each year, her principal recommended that she be promoted to principal at some school within the system. Specifically, Dr. Epstein described Love-Lane as a "particularly strong and effective school administrator" who "is ready for a principalship." *Record, Love-Lane Dep. Exh. 44-45.*

From 1993 to 1995, Love-Lane was assigned to Cook Middle School as assistant principal. There, she worked under principal Ed Armstrong. Again, Love-Lane excelled in her performance and received superior evaluations in all aspects of her performance. She was praised for her ability to "confront issues, not people;" for her openness "with communication and with dealing with critical issues;" and for her "willingness to work with difficult people." *Record, Love-Lane Dep. Exh. 46-47.*

Lewisville Elementary School

During the summer of 1995, Love-Lane received a new assignment from her superintendent, Dr. Don Martin. She was assigned to work at Lewisville Elementary School ("Lewisville") in Lewisville, North Carolina. Martin assigned Love-Lane to this position in spite of recommendations and advice which he had received from a top assistant superintendent that the assignment was "not a good choice." *JA 607-608.* Martin insisted that "an African-American presence" was needed at the school. *JAS 1288; JAS 1211-12.*

The concern expressed by the assistant superintendent, Daisy Chambers, was that Love-Lane

would have a difficult time working under principal Brenda Blanchfield. Ms. Chambers had experienced severe problems at Lewisville in the two years before the assignment. Many staff members and parents in the community had complained to the administration about Blanchfield's leadership. Many of the complaints came from African-American parents and staff members who had experienced significant difficulties with Blanchfield which had led to racial tension.[2] *JA 362-363; JAS 1164; JA 585-602.*

Love-Lane, knowing some of the history of Blanchfield's problems, expressed her fears and concerns to Martin and his assistant, Dr. Joe Johnson. Nevertheless, she assured Martin that she would do her best for the school. She asked Martin to monitor the situation at Lewisville. *JAS 1201.*

Love-Lane remained at Lewisville for the next three years. During the school year 1995-1996, Love-Lane became aware of programs and practices which she believed were detrimental to the interests of African-American children. She expressed her concerns to Blanchfield in a respectful way, but Blanchfield took no action. During the spring of 1996, Love-Lane received a superior evaluation from Blanchfield. *JA 452.*

Tension grew in Love-Lane's second year at Lewisville. Love-Lane observed incidents, policies and practices which adversely impacted African-American

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[2]The difficulties became so divisive that two assistant superintendents, Fred Adams and Daisy Chambers, were called to help resolve the problems. *JA 581; JA 1162.*

students. Love-Lane repeatedly voiced her concerns to Blanchfield and others, but received little support. As she raised such issues more and more, her relationship with Blanchfield began to deteriorate. Love-Lane's expressions of her opinions also led to tension with certain white teachers on the staff at Lewisville. *JAS 1207-1209.*

The focal point of Love-Lane's concern from the first was the "time-out room" which had been established at Lewisville during Love-Lane's first year. The "time-out room" was a small room to which teachers could send students for any reason deemed appropriate by the teachers. Students were assigned to the room for various periods, depending on the teacher and the infraction. A non-certified part-time staff member was placed in charge of the room. There is disputed testimony as to whether the children were given regular academic assignments in the room. What is *not* disputed is that the teachers' arbitrary disciplinary practices led to the referral of a vastly disproportionate number of African-American males and females to the room, many for minor infractions. *JAS 1234-1235; JAS 1170-1196.*

Toward the end of Love-Lane's second year at Lewisville, she received her annual evaluation. She received excellent ratings on most of her work. However, Blanchfield, for the first time, raised questions concerning Love-Lane's "communication" skills. During an evaluation conference, Blanchfield indicated to Love-Lane that "most" of the staff, which she estimated at "85% of the teachers," found her "intimidating," and had objections to Love-Lane's

"direct" style of communication. Pinned down, Blanchfield narrowed the number of complaining staff members to several of the teachers, but refused to provide specific information to Love-Lane concerning these complaints. *JAS 1210; JA 568.*

During the same period, Blanchfield was required to make a recommendation concerning the renewal of Love-Lane's administrative contract. She first recommended that Love-Lane receive a three-year contract as an assistant principal. Following objections from Martin, Blanchfield submitted a new recommendation for a two-year contract. Blanchfield informed Martin that she no longer wished to work with Love-Lane. *JA 513-514.*

Seeing the handwriting on the wall, Love-Lane repeatedly requested transfers to another school, starting in 1996. She was not transferred. *JAS 1211.* During the third year, Love-Lane's relationship with Blanchfield deteriorated further. The decline in her relationship with Blanchfield was directly proportionate to her speaking out on issues and incidents involving racial disparities in the treatment of African-American children. A number of incidents occurred before and during her third year (1997-1998) which evidence retaliation against her for speaking out. *JAS 1211-12.*

During the early part of the third year, Martin met with Love-Lane and Blanchfield. During his meetings he observed that Blanchfield's management skills were deficient and that she had made mistakes in dealing with Love-Lane. However, he unequivocally

announced his ultimatum that Love-Lane would have to "satisfy" her principal, Blanchfield, if she were to continue on an administrative track. He also warned her that the children should not be her concern; that she should do what it took to avoid antagonizing Blanchfield. *JA 471-475; JAS 1212.*

Love-Lane made reasonable efforts to get along with Blanchfield and other teachers who had found fault in Love-Lane's communication. *JA 427.* Nevertheless, Love-Lane continued to address issues involving African-American children. As a result, a small faction of teachers complained against Love-Lane. *JAS 1212-1213.*

At the end of the year, Blanchfield transmitted a draft of her evaluation of Love-Lane to Martin. She did not present a copy to Love-Lane. The evaluation rated Love-Lane "below standard" and "unsatisfactory" in a number of areas of performance, based primarily on Love-Lane's "communication." *JA 476.* Based on the draft, Martin issued a directive recommending the demotion of Love-Lane to teacher. *JA 481.* Martin's assistant delivered the demotion decision and Love-Lane's evaluation to Love-Lane on the same date. No effort was made by Martin to speak with Love-Lane concerning the evaluation prior to making his decision. *JAS 1290.*

Love-Lane grieved the decision of Martin before a committee of the school board. *Record, Brown Dep. Exh. 95.* A split committee voted to support Martin's recommendation, and the full board approved the decision thereafter. *Record, Brown Dep. Exh. 95-96.*

Love-Lane was assigned to teach at a high school within the system where she has been working since that time. She continues to excel as a schoolteacher, but as a result of speaking out on issues and incidents involving racial disparities in the treatment of African-American children, Love-Lane has lost any opportunity to pursue her career as an administrator. *JAS 1216.*

Proceedings Below

On August 26, 1999, respondent filed suit in the United States District Court for the Middle District of North Carolina. She alleged several claims against petitioner and the Winston-Salem/Forsyth County Board of Education ("the Board"), including her primary claim that she had been denied her rights under the First Amendment through free speech. Following discovery, petitioner and the Board filed their motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. On March 26, 2002, the district court issued its opinion dismissing all of respondent's claims. *See Love-Lane v. Martin, et. al.*, 201 F. Supp. 2d 66 (MDNC 2002).

A divided panel of the Fourth Circuit reversed the district court's dismissal of respondent's free speech claim against petitioner.[3] *Love-Lane v. Martin, et*

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[3]The Fourth Circuit affirmed summary judgment on all other claims, including respondent's claims against the Board. Respondent has filed a conditional cross-petition for a writ of certiorari pursuant to Rule 12.5 of the Supreme Court Rules regarding the Fourth Circuit decision affirming the district court's dismissal of respondent's free speech claim against the Board.

al., 355 F.3d 756 (4th Cir. 2004). The majority (Judges Michael and Gregory), in a well-reasoned decision, properly analyzed the summary judgment standards under Rule 56, and recognized that there were genuine issues of material fact with regard to respondent's free speech claim against petitioner. 355 F.3d at 775-782. (Judge Wilkinson dissented with respect to this determination) [Pet. App. 41a].[4]

REASONS FOR DENYING THE WRIT

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." *Sup. Ct. R. 10.* "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Petitioner has presented no compelling reasons justifying this Court's exercise of its judicial discretion to review the Fourth Circuit's decision. There is no conflict between the Fourth Circuit's decision and decisions of this Court; there is no conflict between the Fourth Circuit's application of Constitutional principles and the application of the law by courts in other circuits; and this case presents no pressing need for this Court to address the issues decided by the Fourth Circuit.

To the contrary, the Fourth Circuit properly applied well-settled principles of law—including those

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[4]The opinion of the Fourth Circuit will be cited by reference to petitioner's appendix.

regarding summary judgment, the Constitution and 42 U.S.C. § 1983—to the voluminous evidence presented in this case. Petitioner merely seeks to contest the application of this well-settled law to the facts, an objective which should not provide a basis for this Court's "rarely granted" discretionary review.

The Fourth Circuit Properly Applied Rule 56 Standards in Upholding Respondent's Right to a Jury Trial on the Facts Underlying her Free Speech Claim

The petitioner, Martin, seeks review of the Fourth Circuit's decision denying summary judgment to Martin on the basis of his qualified immunity defense. In doing so, petitioner relies on two decisions of the Court which present the qualified immunity defense in the very different context of the Fourth Amendment. *See Saucier v. Katz*, 533 U.S. 194 (2001); and *Anderson v. Creighton*, 482 U.S. 635 (1987). As will be shown, the Fourth Circuit's decision does not conflict with these or any other decisions of this Court or the principles established by this Court for the consideration of the qualified immunity defense.

In fact, the Fourth Circuit's decision has much more to do with the application of standards under Rule 56, *Fed. R. Civ. Proc.*, than any earthshaking analysis of the defense of qualified immunity. It is clear from the Court's detailed opinion that the court understood its role to review, *de novo*, the district court's grant of summary judgment to petitioner; and in doing so, to view and consider Love-Lane's evidence in the light most favorable to the plaintiff. After undertaking its painstaking analysis of the evidence,

applying the elements of a plaintiff's claim under the First Amendment, and the elements of the qualified immunity defense, the majority found that summary judgment was inappropriate.

The petitioner does not question the Court's analysis in terms of the elements considered or the law to be applied. Instead, petitioner makes a factual argument, couched in the language of certiorari standards, in his effort to convince this Court that review should be granted. Indeed, this case is purely and simply one involving factual conflicts which must be resolved by a jury at trial.

That the focus of the Fourth Circuit's decision is Rule 56 rather than the substantive application of free speech or qualified immunity principles is made clear from the outset of the majority opinion:

> In reviewing the summary judgment, we view the facts in the light most favorable to Love-Lane, the non-moving party, drawing all justifiable inferences in her favor. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248-49, 91 L.Ed. 2d 202, 106 S. Ct. 2505 (1986). The dissent does the opposite: it ignores the best of Love-Lane's evidence and states the facts in the light most favorable to the Board and Martin. This mistaken approach, of course, allows the dissent to say that this case involves nothing more than a superintendent's "decision to separate . . . two administrators embroiled in a

> personality conflict." Post at 33-34. This case involves much more than a personality conflict when the facts are viewed, as they must be, in Love-Lane's favor: it involves a superintendent who demoted an assistant principal because she spoke out against race discrimination and discipline at a public school.

355 F.3d at 775. [Pet. App., p. 14a] As foreshadowed, the two opinions of the Fourth Circuit then diverge, not on any substantive application of this Court's precedent, but on the facts.

Viewing the facts in the light most favorable Love-Lane, the majority finds that Love-Lane established the elements of her free speech claim in showing that (1) she spoke out on a matter of public concern; (2) that her interest in free speech outweighed her employer's interest in the efficient operation of the school; and (3) that her protected speech was a substantial factor in petitioner's decision to demote her. 355 F.3d at 776. [Pet. App., p. 15a] The dissent, on the other hand, applying the same standards under its *own* view of the evidence (in the light most favorable to Martin), essentially argues the facts and concludes that Love-Lane's speech on personal concerns predominated, and created disruption to the workplace, which ultimately motivated Martin's decision to demote her. [Pet. App., pp. 41a-63a].

The same factual divergence is shown with respect to the analysis of petitioner's qualified immunity defense. The majority, emphasizing that the

ultimate burden will be on Love-Lane to convince a jury of her case, finds, independently, for summary judgment purposes, that her rights to speak out on a matter of public concern - racial discrimination in the public schools - was clearly established and "that any reasonable school superintendent in Martin's position in 1997 and 1998 would have realized that he would violate the Constitution if he, *in fact*, took adverse employment action against Love-Lane for speaking out about race discrimination at Lewisville Elementary School." 355 F.3d at 784 [Pet. App., p. 31a]. Again, the dissent argues the facts from petitioner's evidence, on which it concludes that Martin proved his qualified immunity as a matter of law.

While the parties - and more importantly the majority and dissenting opinions of the Fourth Circuit - diverge on their application of Rule 56 standards, their views do not implicate any conflicts with First Amendment and qualified immunity jurisprudence of this Court. Again, this is purely and simply a factual contest which should and must ultimately be determined by the jury. And since the majority specifically articulated the facts—in the light most favorable to plaintiff—on which it based its reversal, there is simply no "compelling reason" for review.

1. The Fourth Circuit's application of Rule 56 standards does not raise any conflicts with this Court's decisions in *Saucier v. Katz* and *Anderson v. Creighton*.

In *Saucier v. Katz* 533 U.S. 194 (2001), this Court found that a law enforcement officer was entitled to the

qualified immunity defense based on the facts presented, which were largely undisputed. The plaintiff in the case was an animal rights advocate who was protesting experimental practices against animals on grounds which were being converted from a military base where the practices had taken place to a national park. The forum for the speech was an event dedicating the park grounds, at which Vice President Gore, among others, was speaking. The evidence showed that the plaintiff, during the ceremony, walked to a barrier separating the speakers, and held up a banner of protest, and was immediately shepherded away by the military police. Plaintiff claimed that the officer used excessive force in placing him in the police vehicle.

This Court found, as a matter of law, that the officer, in his individual capacity, had established his qualified immunity defense in that he had followed standard police policies in preventing incidents at such events, and in placing the plaintiff into the vehicle. Since there was no convincing evidence of excessive force,[5] viewed under any standard, the Court found that a reasonable officer in the defendant's position would not have known that he had violated the plaintiff's clearly established rights to be free from such force.

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[5]This Court was clearly unconvinced that a constitutional violation had taken place ("it is doubtful that the force used was excessive," 533 U.S. at 208) which led to its decision that the officer was not on notice that he was acting in violation of clearly-established law.

Saucier stands for the well-established principle that where the material facts are undisputed, the court should determine the individual officer's qualified immunity defense. The difference in the two cases is, as the Fourth Circuit opinions make clear, the difference in the construction of the facts. The material facts in the present action are directly, and in many instances, hotly disputed. The facts in *Saucier* were not. The facts in this case, viewed in the light most favorable to plaintiff, establish a constitutional violation. The facts in *Saucier* did not.

This Court's decision in *Anderson v. Creighton*, 482 U.S. 635 (1987), is equally inapplicable to any legal issues raised in this case. *Anderson*, like *Saucier*, involved a claim of a violation of the Fourth Amendment. The plaintiff homeowners alleged that the individual defendant officer had conducted a forced warrantless search of their home. The defendant officer asserted qualified immunity, alleging that he acted under the belief that he had probable cause. The district court granted summary judgment in favor of the defendant, and the Eighth Circuit reversed.

The issue presented to the Supreme Court was whether the test of qualified immunity merged with the test under the Fourth Amendment requiring that the facts be viewed through the eyes of a reasonable officer. This Court held that there are two distinct determinations which require independent analyses of the facts. Initially, the court must determine whether there was a constitutional violation. Then, upon consideration of the qualified immunity defense, the

court must apply a distinct test determining whether the constitutional violation was clearly established and whether a reasonable officer would or should have known that his actions violated the clearly-established law. The court remanded the action to the Eighth Circuit for reconsideration of the issues.

The majority in the present case clearly and demonstrably followed this Court's established methodical framework in considering petitioner Martin's claim for qualified immunity, consistent with the principles of *Anderson* and *Saucier*. In *Saucier*, the Court advised:

> Taken in light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? [citation omitted]. In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established.

533 U.S. at 201.

Similarly, the Fourth Circuit articulated the test of qualified immunity, applied it to the facts, and determined that Martin was not entitled to the defense.

> To determine whether Martin is entitled to qualified immunity, we must (1) identify the right allegedly violated, (2) consider whether at the time of the alleged violation the right was clearly established, and (3) determine whether a reasonable person in Martin's position would have known that his actions would violate that right. *Wilson v. Layne, 141 F.3d 111, 114-15 (4th Cir. 1998).* We conclude that Martin is not entitled to qualified immunity.

355 F.3d at 783.

As instructed in *Saucier,* the court then determined, based on its prior analysis, that "by 1997 it was clearly established that Love-Lane's speech about race discrimination at Lewisville involved a matter of public concern." 355 F.3d at 784. Noting that Love-Lane's speech had not affected the welfare of the the Lewisville students, the Court emphasized that "we are persuaded that the interests to be balanced under *Pickering* weigh so heavily in Love-Lane's favor that her right to speak about race discrimination in a public school was clearly established well before 1997 and 1998." *Id.*

Addressing the final element of the qualified immunity defense, the Court determined that defendant Martin, or any reasonable superintendent, would have known that demoting Love-Lane for speaking out about race discrimination at Lewisville would violate her rights:

> Because case law had confirmed Love-Lane's right to speak and because the *Pickering* balancing test tips decidedly in her favor, we hold that any reasonable school superintendent in Martin's position in 1997 and 1998 would have realized that he would violate the Constitution if he, *in fact*, took adverse employment action against Love-Lane for speaking out about race discrimination at Lewisville Elementary School.

355 F.3d at 784. Based on this analysis, the Fourth Circuit reversed "the district court's determination that Martin is entitled to qualified immunity with respect to the Love-Lane's free speech claim." 355 F.3d at 785.

Petitioner, citing repeatedly to Judge Wilkinson's dissent, claims that the Fourth Circuit failed to considered "undisputed evidence" which would have weighed in favor of petitioner's defense. As with respect to so many of the facts tossed back and forth between the majority and the dissent, the evidence cited by petitioner is not only disputed, but *sharply* disputed.

Again, petitioner's argument raises the contrasting approaches employed by the respective parties and the majority and dissent in the Fourth Circuit. Petitioner essentially argues that facts may be assumed by the courts where there are clear issues of credibility. Respondent, in line with the majority of the Fourth Circuit, contends otherwise—that it is for the jury to resolve issues of fact including issues of

credibility. Recognizing the difficulties which are presented in factual determinations of such elements as motive, bias and intent, this Court has warned: "Where motive and intent play leading roles, the proof is largely in the hands of alleged conspirators and hostile witnesses ... (T)rial by affidavit is no substitute for trial by jury ... ." *Potter v. Columbia Broadcasting System, Inc.*, 364 U.S. 464, 473(1962). *See also Hope v. Pelzer*, 536 U.S. 730 (2002).

Viewing this case for what it *is*—a factual contest—the Fourth Circuit properly concluded that it "involves much more than a personality conflict when the facts are viewed, as they must be, in Love-Lane's favor: it involves a superintendent who demoted an assistant principal because she spoke out against race discrimination and discipline at a public school." 355 F.3d at 775. [Pet. App., p. 14a].

The Fourth Circuit's decision does not violate the principles established by this Court in *Saucier* or *Anderson*. Through their repeated references to conclusory characterizations of Love-Lane's conduct with such *red-flag* descriptives of "unprofessional," "divisive," "uncooperative," "disruptive," "tactless," and the *like*, untested in most instances by cross-examination or specific explanation, or the tests of credibility to be applied by an independent factfinder; petitioner, like the dissent in the Fourth Circuit, seeks to transform a traditional factual contest, which should and must be tried by a jury, into a case of misconstrued law. This Court's rules admonish against such an effort.

2. The Fourth Circuit's decision does not conflict with the decisions of other circuits.

The Fourth Circuit's decision in this action does not conflict with the legal principles which guide all of the circuits. Those principles have their source in the Constitution and Rule 56. While some courts may come to different conclusions in reviewing the facts of varying cases, their legal roadmap is the same. *See, e.g., Settlegoode v. Portland Public Schools et al*, 362 F.3d 1118 (9th Cir. 2004).

There is no conflict among the circuits as to the application of an analysis of the facts concerning qualified immunity.

3. The Fourth Circuit's decision does not present new federal grounds which require review by this Court.

The Fourth Circuit's decision presents no new federal grounds which require, or even invite, review by this Court. The decision is, purely and simply, an analysis of the facts concerning established principles of qualified immunity, pursuant to the principles of Rule 56. The court followed the established rules of this Court, which are not in controversy. *See Hope v. Pelzer*, 536 U.S. 730 (2002).

CONCLUSION

Certiorari is not justified in this action. The Fourth Circuit applied the Constitutional principles, while conforming to the standards of Rule 56. There is

no conflict with decisions of this Court or other circuit courts. Because there are no grounds for granting review, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,
this the 21st of June, 2004.

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